United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

DOCKET No. 76-1100

PAUL V. OATES,
DEFENDANT-APPELLANT

AND APPENDIX
APPELLANT'S BRIEF ON APPEAL

TALBOT, GRANT & McQUARRIE

By: JAMES HOWARD GRANT
Joseph Grano, of counsel
Attorneys for Defendant-Appellant
5th Fl., American Title Bldg.
139 Cadillac Square
Detroit, Michigan 48226
(313) 963-6969

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED

OTHER AUTHORITIES CITED

FEDERAL RULES OF EVIDENCE

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN CONSIDERING THE APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS EVIDENCE BY CONCLUDING EITHER THAT THE GOVERNMENT OFFICIALS HAD PROBABLE CAUSE TO ARREST THE DEFENDANTS FOR A NARCOTICS OFFENSE OR THAT THE GOVERNMENT OFFICIALS HAD REASONABLE GROUNDS TO DETAIN THE DEFENDANTS TEMPORARILY FOR INVESTIGATIVE PURPOSES?

II.

WAS THE TRIAL COURT IN ERROR WHEN IT DENIED THE DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY PERMITTING THE INTRODUCTION OF HEARSAY TESTIMONY CONCERNING THE CHEMIST ANALYSIS OF THE CHIEF EVIDENCE INTRODUCED BY THE GOVERNMENT?

III.

WAS THE TRIAL COURT IN ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE PRESUMPTION OF INNOCENCE CONTINUED WITH THE DEFENDANT THROUGHOUT THE TRIAL AND INTO ITS DELIBERATIONS?

STATEMENT OF FACTS

On January 5, 1976, Appellant, Paul V. Oates, was brought on for trial in the United States District Court for the Eastern District of New York. He was charged in a two count indictment: one count in conspiracy to possess and distribute a controlled substance; and one count in possession with the intent to distribute a controlled substance.

Immediately prior to trial, Appellant's pre-trial motion to suppress evidence was brought on for hearing before the trial court.

At that hearing, DEA Agent Garfield Hammonds was called as a witness for the Government. Agent Hammonds testified that on April 26, 1972, he was at Detroit Metropolitan Airport preparing to return to New York City. [Tr., Jan. 5, at 22.] At approximately 7:00 p.m. he went to American Airlines gate 19. He observed Paul Oates in the presence of another black male. He stated that he "knew Paul Oates as a major trafficker of narcotics in the Detroit metropolitan area and (he had) seen photographs of Paul Oates." [*Id.*, at 23.] Oates and the unknown black male were sitting together in the waiting

area and they appeared to be in conversation. [*Id.*, at 24.] However, Agent Hammonds testified that he never heard any of the conversations. [*Id.*, at 25.] He continued to observe them together for approximately 15 to 20 minutes. [*Id.*, at 26.] When the flight was called for New York, Oates and the other man stood up and walked toward the ramp. Oates boarded the plane and sat in the first class compartment. The other man boarded the plane and went to the coach section. [*Id.*, at 2 Agent Hammonds boarded the plane and took a seat in the tourist cabin directly across from the then unknown black male. [*Id.*, at 28.] Agent Hammonds testified that during the flight to New York he observed that person to have a continually running nose, and he also observed what appeared to be needle tracks on his hands and his hands were swollen. [*Id.*, at 29-30.]

Upon arrival at New York's LaGuardia Airport at approximately 10:00 p.m., Hammonds said that he observed the unidentified male leave the aircraft and meet Oates in the corridor of the terminal. [*Id.*, at 32.] Oates and the other person engaged in conversation as they walked down the corridor. [*Id.*, at 33.] They walked up the corridor toward the ramp, and approximately mid-way in the corridor, Hammonds observed them meet

another black male known to him as William Charles McMillan whom he knew "to be associated with the drug culture in New York City." [*Id.*, at 34.] Oates then shook hands with McMillan, and McMillan entered a phone booth to dial the phone. Oates entered the same phone booth with McMillan, and McMillan handed Oates the phone at which time Oates appeared to engage in conversation. [*Id.*, 35.] Hammonds never heard any conversation on the part of any of those people. He walked past the booth and continued walking to the American Airlines ticket counter to inquire as to the next flight to Detroit. He was told that the next flight from LaGuardia to Detroit Metropolitan Airport would be 7:55 a.m. the next morning. [*Id.*, at 36.] Hammonds then left the airport and went to his office. He contacted his assistant group supervisor and asked for permission to establish a surveillance at LaGuardia Airport the following morning. [*Id.*, at 37.]

The following morning, April 27, 1972, Hammonds returned to LaGuardia Airport at approximately 7:10 or 7:15 a.m. with three other special agents. [*Id.*, at 38.] He went to American Airlines gate 10 from which the flight to Detroit was supposed to depart. He saw Oates and the still unidentified black male sitting in

the waiting area at the gate. At that time, Oates and the other person were not sitting together. Hammonds stated that he observed a "very large bulge in the right hand coat pocket" of the unidentified male. Hammonds went into the waiting area and took a seat next to that person and he observed him to have a "large bulge on his thigh . . . it just looked unusual to me." Hammonds stated that the lounge area was "fairly crowded." [*Id.*, at 40.]

Hammonds immediately left the lounge area and asked Sepecial Agent Lentini to get airport uniformed security people. Hammonds met with the airport security people and told them of his observations the night before and his observations of that morning. [*Id.*, at 41.] Hammonds testified that he had participated in a minimum of 50 narcotic arrests. He estimated that the percentage of arrests that involves seizure of weapons was "over 50 percent." [*Id.*, at 42.]

The two security officers, DeAlfi and Fromkin, escorted Oates and the unidentified male from the gate to the American Airlines manager's office in the main corridor. When they arrived at the office, customs officers Fromkin and DeAlfi, Special Agent Ianelli, Special Agent Degnan, Special Agent Lentini and Special

Agent Heywood and Hammonds were present in the room. Oates and the other male were then asked for some form of identification. They were frisked, and Hammonds heard the customs officer ask the other male to remove a large bulge from his side. That male, who later turned out to be Issac Daniels, unzipped his pants and removed a plastic bag containing white powder. [*Id.*, at 45.] (The evidence which the Government sought to present at trial was white powder contained in a polyethylene bag which was enclosed in a manila envelope.) [*Id.*, at 47.]

Upon cross examination, Hammonds testified that prior to encountering Oates in Detroit Metropolitan airport on April 26, he had never personally seen Oates before. He had only seen a photograph produced by the Detroit Metropolitan Police Department. [*Id.*, at 54.] Hammonds testified that he had never investigated Oates. He testified that he did not know the name of the person who was accompanying Oates until after the arrests were made. [*Id.*, at 55.] He testified that during the time he had the two persons under observation in the Detroit airport they never attempted to be evasive in any fashion, nor did they draw any attention to themselves in any other way than just being there. [*Id.*, at 56.] He

testified that when the plane arrived in New York he did not notice that they were attempting to avoid each other but that they were just walking along talking in the corrid . [*Id.*, at 64.] He testified that at the time he saw Oates and Daniels meet McMillan in the corridor in LaGuardia Airport, he never observed him (McMillan) "even speak to Daniels." [*Id.*, at 65-66.]

Hammonds could provide no factual information concerning the whereabouts of Daniels, Oates and McMillan from the time Hammonds last saw them in the corridor of American Airlines at LaGuardia until he next saw Oates and Daniels in the waiting area at gate 10 the following morning.

When he saw Daniels and Oates on the morning of April 27, Daniels was merely sitting in the waiting area; Oates appeard to be doing the same, perhaps looking at Daniels or in Daniels' direction. [*Id.*, 75.]

Concerning the matter of the arrests which Hammonds had participated in, on cross examination Hammonds admitted that by April 27, 1972 he had been involved in only 15 to 20 arrests. That approximately three of these arrests were at an airport. He could not remember whether or not contraband had been discovered in those arrests at the airport. He could not remember whether or

not any weapons had been confiscated in those arrests. [*Id.*, 76-77.]

Hammonds also testified on cross examination that he had no idea when Daniels and Oates had arrived at the waiting area on the morning of April 27.

Agent Hammonds testified that prior to the frisking of Oates and Daniels, in fact at the time he sent Lentini to get the costoms security people, he had already decided to place the two men under arrest; and that, specifically, he then thought that he had probable cause to place Daniels under arrest. However, he did not inform the other agents that he intended to make the arrest. [*Id.*, at 85-86.]

Customs security officer Kerry Fromkin was also called as a witness for the Government. He testified that on the morning of April 27, 1972, he and his partner Arthur DeAlfi were on duty together at LaGuardia. At approximately 7:15 a.m. two agents from the Bureau of Narcotics contacted them and asked for their assistance. The agents said that they had two suspects under surveillance. "They said they were carrying drugs and were armed and wanted our assistance in indentification checks or any assistance we could provide at that time." [*Id.*, at 105.]

They went to gate 10 and Agent Hammonds told them

of the bulge in Daniels' coat. Fromkin said that he noticed the bulge too. [*Id.*, at 107.] Fromking stated that he had approached Oates and identified himself and asked Oates to accompany him to a private room. DeAlfi talked to Daniels and the four of them walked to the "small American Airlines office." [*Id.*, at 111.]

Fromkin asked Oates for identification, and Oates produced a driver's license. Fromkin asked Oates if he had a weapon on him and Oates said no. Fromkin then asked Oates if he minded if he had did a pat-down search. Fromkin proceded with the pat-down which was "negative." [*Id.*, at 112.]

Oates was carrying a paper bag. Fromkin stated that he searched the bag which contained old clothes and other articles.

Fromkin stated that he observed his partner, DeAlfi, make a pat-down search of Daniels. When DeAlfi got to the pocket of the overcoat which Daniels was wearing, there was a large bulge and he removed it. It was a wallet. He continued the pat-down search and on Daniels' right leg he discovered another bulge. DeAlfi asked Daniels, "What is this?" when he got to the thigh and Daniels said "powder." At this point DeAlfi said to remove it, to Daniels. Daniels then opened his pants

and dropped them and removed a large brown package, a manila envelope. [*Id.*, at 113.]

Fromkin stated that inside the manila envelope was a bag containing white powder and a white envelope containing powder. The white envelope was taken out of the bag and replaced. Fromkin then put his initials on the maila envelope. [*Id.*, at 116.] In describing the seizure of the packet, Fromkin stated " . . . at the time it was a little fatter than it is now." [*Id.*, at 119.] Over objection of counsel, the court admitted the evidence for the purposes of the hearing. After the seizure of the packet, Oates and Daniels were placed under arrest by an agent of the Bureau of Narcotics. There was a jurisdictional dispute, and Oates and Daniels were held for the arrival of additional custom officers [*Id.*, at 123-124.]

Upon cross examination, Fromkin stated that there was not attempt to request identification from either Oates or Daniels in the waiting area. [*Id.*, at 130.]

Arthur DeAlfi was called as a witness for the Government and testified that he was with Fromkin on the morning of April 27, 1972, when they were approached by agents of the Bureau of Narcotics and Dangerour Drugs to say that they had two men under observation at gate 10.

The agents said that they had reason to believe that they were armed and possibly carrying narcotic drugs. [*Id.*, at 147-148.] They went to the gate area, and DeAlfi observed a large bulge in the coat pocket of Issac Daniels. At that time Daniels was approximately 20 feet from DeAlfi. [*Id.*, at 148-149.] DeAlfi said that he had both men under observation for "a few minutes before the flight aboarded."

(At trial, DeAlfi appeared as a witness for the Government. He then testified that he observed a bulge in Daniels' coat pocket on the right side. [Tr., Jan. 8, 217.] However, he admitted that he appeared as a witness before the grand jury on May 5, 1972, approximately eight days after the arrest in this matter [*Id.*, 216], and at that time he told the grand jury, "one of the individuals had a large bulge on the left side of his leather coat." [*Id.*, 218.])

DeAlfi stated that he approached Daniels; he identified himself as a customs security officer and asked Daniels to come with him. Daniels and Oates were taken to a small office in the vicinity of gate 8. [*Id.*, at 150.]

DeAlfi asked Daniels if he had any identification and Daniels said no. "And then I asked him if he would

consent to being searched and he agreed to that. He said we could search him." [*Id.*, at 151.] DeAlfi patted Daniels down, and he felt a large bulge in one of the coat pockets. "I couldn't be quite sure what it was. I removed it from his pocket and it turned out to be a wallet." [*Id.*, at 151.] DeAlfi described the wallet as "It was quite large for a wallet. To describe it, I would say it was almost--almost three inches thick. It was stuffed full of papers, addresses and so on and so forth. Extremely large wallet." [*Id.*, at 152.]

DeAlfi then continued with his pat-down and came to an area just inside the right thigh where he felt another large bulge. He asked what it was. Daniels replied it was powder. DeAlfi asked Daniels to lower his pants and remove the package which Daniels did. DeAlfi then stated that the package was a brown manila envelope containing two plastic packages inside the manila envelope. "One was rather large and a smaller one." [*Id.*, at 153.]

Thomas L. Lentini, a DEA agent, was called by the Government to testify. Special Agent Lentini testified that on the morning of April 27, 1972, he participated in a surveillance at LaGuardia. He testified that he went to the American Airlines office. "The purpose

(for going to the American Airlines office) was to gain assistance from uniformed officers because we had intended to make an arrest and for the safety of the people in the airline and what not, we thought it would be better if we had uniformed assistants." [*Id.*, at 172.]

In argument to the court in opposition to the Motion to Suppress Evidence the Government said:

> Now it is the Government's position, your Honor, that although Mr. Paul Oates and Issac Daniels were detained that it is not necessarily a fact that they were under arrest at the time they were take out of the boarding area. I think the evidence that your Honor heard is consistent with that position.
>
> Again, even assuming and accepting that at that point in time they were placed under arrest it is the Government's position that probable cause existed for the arrest. [Tr., Jan. 6, at 293.]

The court denied the Motion to Suppress Evidence, basing its denial, in part, on *Terry vs. Ohio, 392 US at page 5.* [Tr., Jan. 6, at 302-304.]

At trial, Shirley M. Harrington was called by the Government as a witness. [Tr., Jan. 12, at 439.] Mrs. Harrington was a chemist in the employ of the United States Customs Service. She was asked to identify Government's Exhibit No. 1 and asked whether or not she could tell if she or any member of the

chemists' staff of the Bureaus of Customs had occasion to conduct certain tests on that exhibit? She replied, "Yes sir. I am sure these tests were by Mr. Weinberg." Objection was immediately entered by counsel. [*Id.*, at 144.] At a side bar conference the Government stated that "Mr. Milton Weinberg was here last week to testify that the tests that he conducted on the Government's Exhibit No. 1. He is not (sic) retired, and I am told by his wife very sick. Apparently he has some type of bronchial infection." [*Id.*, at 441-442.[After a brief adjournment, the Government announced that it would rely on the Federal Rules of Evidence, Section 803(6)(8)(24). [*Id.*, at 443-444.] The court stated that it would admit testimony concerning identification of initials on the evidence under Federal Rules of Evidence 901(A)(B)(2)(7)(8). [*Id.*, at 445.]

The copy of the chemist's report provided to the defense prior to trial did not have a signature. [*Id.*, at 447.] The defense objected to the failure of the Government to provide notice that it intended to introduce such hearsay evidence. The defense called the attention of the Court to F.R.E. 804; and the Government responded by referring to 803(24), and it asserted that sufficient notice had been given. [*Id.*, at 448-449.]

Testimony of witness Harrington continued over defense objections. [*Id.*, at 450.] It was the Government's contention that the evidence to be presented would fall within the business records exception to the hearsay rule. [*Id.*, at 451.]

Mrs. Harrington was shown Government's Exhibit for identification No. 12 which she identified as a U.S. Customs Form 6415 for use to report the results of laboratory analysis. [*Id.*, at 453.] She testified that the numbers on Exhibit No. 12 and on Exhibit No. 1 were the same.

She testified that she was familiar with the handwriting on Government's Exhibit 1. and the initials on that exhibit were those of Milton Weinberg. [*Id.*, at 457.] She testified that the signature of the chemist on Exhibit No. 12 was in the handwriting of Mr. Weinberg. [*Id.*, at 458.] She testified that the findings in the laboratory report were that the material contained 36-1/2 percent of heroin hydrochloride, admixed with lactose. She testified that the net weight of the substance when received was 495 grams and that the net weight returned was 485 grams. In response to a question as to what "net weight returned" meant, she stated: "It is the net weight of the material returned to the agent or our customs

officer, after the chemist is through analyzing." [*Id.*, at 458-459.]

In relation to Government's Exhibit No. 13 for identification it was the notes of the Government chemist concerning the analysis. She testified that she recognized the handwriting on the Exhibit as being that of Mr. Weinberg. She testified that the reverse side of Exhibit No. 13 indicated the work that Mr. Weinberg did at arriving at his conclusion. In addition to other information she said that the Exhibit indicated the Mr. Weinberg "did preliminary task tests on each of the two exhibits, and he has very definitely marked that he did them on both exhibits, and he performed tests that led him to believe that the material contained heroin hydrochloride, and then proceded with more sophisticated tests and proof, infra-red spectroscope." All of this she said indicated that the material in fact was heroin hydrochloride. [*Id.*, at 460-461.]

Mrs. Harrington's attention was called to Exhibit No. 12, and she was asked if there was any idication as to what had been done with the substance that was turned over to the customs chemist for analysis. To this she replied, "It is scratched up on the copy, but I can read through it." [*Id.*, at 461.]

At that point, the Government announced that it had no further questions whereupon a side bar conference was called by the Court. The defense again made objection to the introduction of the evidence and to testimony. [*Id.*, at 462-464.]

Upon cross examination, Mrs. Harrington agreed that she had no part whatsoever in the analysis of anything contained in the Government's Exhibit No. 1. [*Id.*, at 468.] She stated that Mr. Weinberg retired very shortly before she came to work for the United States Customs in New York. She never actually worked with Mr. Weinberg in the laboratory. [*Id.*, at 465.] She never observed Mr. Weinberg do any test. [*Id.*, at 470-471.] She never received any notes from him on any matter.

Further, Mrs. Harrington descrived the procedure for re-analyzation of the material following conclusion of prosecution. She was asked whether or not the material in Government's Exhibit 1 had been analyzed twice. She responded, "Yes sir. I am almost positive that I had done that one recently . . . " [*Id.*, at 474.]

Howevern when asked to inspect the evidence itself, the witness failed to find her initials on the package, and she stated she was wrong as to the second analysis. [*Id.*, at 475-476.]

The defense objections were overruled and both exhibits were entered into evidence. [*Id.*, at 465.]

In a conference in chambers following the conclusion of the case for the defense, the Court reviewed the charge which it intended to to present to the jury and objections to various portions thereof were entered. Objection was specifically entered to the Court's charge on "the Presumption Of Innocence" concept. At objection counsel stated, "The defendant begins a trial with a clean slate, and the presumption of innocence remains throughout deliberation of the jury until such time as the jury unanimously agrees that he is guilty." [Tr., Jan. 13, at 547.] To which the Court responded:

> *I will not charge it in that fashion. The presumption of innocence is rebutted by each and every fact that the prosecutor presents to the jury. It is rebutted by and every time the prosecutor shows facts and circumstances under which a juror makes a consideration.*
>
> *I will not charge that the presumption of innocence continues throughout the trial. It is always the presumption of innocence, but it is rebutted every time a fact is raised through the prosecution every time.* [*Id., at 547-548.*]

Defendant Paul V. Oates was found guilty on both counts as charged. [Tr., Jan. 14, at 721-722.]

ARGUMENT

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONSIDERING THE APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS EVIDENCE BY CONCLUDING EITHER THAT THE GOVERNMENT OFFICIALS HAD PROBABLE CAUSE TO ARREST THE DEFENDANTS FOR A NARCOTICS OFFENSE OR THAT THE GOVERNMENT OFFICIALS HAD REASONABLE GROUNDS TO DETAIN THE DEFENDANTS TEMPORARILY FOR INVESTIGATIVE PURPOSES.

In this case, as in *Sibron v. New York, 392 US 40, 88 S Ct. 1889, 20 L Ed. 2d (1968)*, both the Government and the trial court have "had some difficulty in settling upon a theory for the admissibility" of the evidence seized from the Defendants. *Id., at 45-46; 20 L Ed. 2d at 925.*

Early in the suppression hearing, Agent Hammonds testified that he made a field decision to arrest Defendants while they were waiting to board an airplane at LaGuardia Airport. [Tr., Jan. 5, at 41.] Likewise, Agent Lentini testified that the plain clothes narcotics officers sought the help of uniformed customs officers "because he had intended to make an arrest." [*Id.*, at 172.] On the other hand, when Agent Hammonds was cross-examined about reading the Defendants their

rights after their arrest, he answered that the Defendants were not really under arrest but instead "were being detained, temporary detainer" (sic). [*Id.*, at 95.] The prosecuting attorney was equally uncertain. He argued that "it's not necessarily a fact that they were under arrest at the time they were taken out of the boarding area;" he then added that if the Defendants were under arrest, the arrest was supported by probable cause. [*Id.*, 302-304.]

In view of the Government's uncertainty, the trial court's ambiguity on this issue is not surprising. Relying on *Terry vs. Ohio, 392 US 1, 88 S Ct. 1868, 28 L Ed. 2d 889 (1968)*, the Court at one point labeled the officers' actions an investigative stop. [Tr., Jan. 6, at 302-303.] At a later point, however, the Court seemed to conclude that the officers arrested the Defendants. [*Id.*, at 304.]

First, it would be unreasonable to expect law enforcement officials to understand the definitional nuances of search and seizure law. Nevertheless, the record in this case leaves the impression that the official conduct at LaGuardia is conduct in search of a post facto rationale. Moreover, the question is not merely one of semantics. The requisite probable cause

to justify an arrest is both quantitatively and qualitatively higher than that needed to justify a stop.

A.

THE OFFICERS' CONDUCT IN SEIZING THE DEFENDANTS SHOULD BE CONSIDERED A FULL ARREST RATHER THAN AN INVESTIGATIVE STOP.

At the outset it seems both incongruous and even disincongruous for the Government to argue that a mere stop o-curred after two of its agents testified that they intended to arrest the Defendants. To argue that an arrest did not occur until the evidence was uncovered is to argue that the uncovered evidence may be used to justify the arrest. Of course, it is "axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron, supra, 392 US at 63, 20 L Ed 2d at 934-935; Johnson v. United States, 333 US 10, 16-17, 68 S Ct. 367, 92 L Ed 436 (1948).* The official conduct in this case also belies the view that a mere stop occurred. First, seven Government law enforcement officials (five of whom were special narcotics officers) participated in the seizure and search of Oates and Daniels [*Id.*, at 45]. Second, the full-scope of the search [see II, B, *infra*], belies the notion that a mere *Terry* stop and frisk occurred. The officers

looked into a bag containing old clothes that Defendant Oates was carrying. They also removed a wallet from Daniels, without any indication that the wallet felt like a weapon. [Tr., Jan. 5, at 113, 151.] Finally, the officers also required Daniels to lower his pants to remove a "bulge" inside the right thigh. [*Id.*, at 113, 153.]

Most significantly, the officers at no time testified that they thought that the leg bulge might be a weapon. In fact, if the officers really expected to find a weapon, they most probably would have searched the Defendants immediately for their own protection instead of first transporting them to a small room in the airport for a complete search. [*Id.*, at 87-88.] Since the officers so clearly engaged in a full search for narcotics evidence, not a limited search for a weapon, it must be concluded that more than a temporary stop had occurred. In short, the officers did what both Hammonds and Lentini said that they set out to do: a full arrest occurred before the Defendants were searched.

Case law also supports what the facts here make plain: that an arrest occurred before the search. In *Peters v. New York, 392 US 40, 88 S Ct. 1889, 20 L Ed 2d 917 (1968),*

a companion case to *Terry* and *Sibron, supra,* the Court found that an arrest, not a mere stop, had occurred. "when the policemen gathered Peters by the collar, he abruptly 'seized' him and curtailed his freedom of movement . . . " The Third Circuit has stated the matter succinctly: An arrest is the seizing of a person "by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." *United States v. Lampkin, 464 F 2d 1093 (3d Cir. 1972).* Such an "absolute restraint" of the defendant, as occurred both in *Lampkin* and in this case, cannot be labeled less than a full arrest. [See *464 F 2d 1095.*]

As indicated, both the officers on testimony and all the surrounding circumstances demonstrate "an intention to take [the defendants] into custody", *Lampkin, supra.*

B.

AT THE TIME THE OFFICERS SEIZED THE DEFENDANTS, THEY CLEARLY DID NOT HAVE PROBABLE CAUSE TO JUSTIFY A FULL ARREST.

While both arrests and stops are Fourth Amendment seizures, and arrest is much more intrusive and accordingly requires a greater level of probable cause. An arrest cannot be supported by "common rumor or report,

suspicion, or even strong reason to suspect" *Henry v. United States, 361 US 98, 80 S Ct. 168, 4 L Ed 2d 134 (1959), emphasis added.* By its very language, probable cause connotes probabilities rather than possibilities.[1]

As Justice Harlan stated in concurring with the court's finding of a lack of probable cause in *Sibron*, the police surveillance disclosed nothing to make it "probable" that *Sibron* was engaged in narcotics traffic. *392 US at 72, 20 L Ed 2d at 94 (Harlan, J. concurring).*

If probable cause does not entail a "probability" of criminal conduct, there is no way to distinguish the requisite cause to justify an arrest from the requisite cause to justify a stop. A stop requires reasonable suspicion, based upon articulable facts, *United States v. Brignoni-Ponce, US , 95 S Ct. 2574, L Ed 2d (1975).* As *Henry, supra,* emphatically makes clear, however, an arrest cannot be justified by even a strong reason to suspect.

It is Appellant's position that the officers in this case did not have sufficient cause to justify an investigative stop under *Terry;* even more clearly; they

---

[1] See *LaFave, Street Encounters in the Constitution: Terry, Sibron, Peters* and beyond, *67 Mich. L. Rev. 40, 73-75 (1968).*

did not have full probable cause to arrest. First, Agent Hammonds testified that he saw Appellant Oates and an unknown individual at the Detroit Metropolitan Airport. [Tr., Jan. 5, at 23.] Not until after the arrest did Agent Hammonds discover the identity of the other individual. [*Id.*, at 75.] Hammonds testified that he knew Defendant Oates "as a major trafficker of narcotics." [*Id.*, at 23.] But he admitted on cross-examination that he had never met Defendant Oates personally [*Id.*, at 54.] At best, Hammonds had previously seen police photographs of Oates. [*Id.*]

It pays to stop at this point to evaluate this testimony. In *Spinelli v. US, 394 US 410, 89 S Ct. 584, 21 L Ed 2d 937 (1969)*, the Supreme Court evaluated an officer's statement that the Defendant was "known to this affiant and to federal law enforcement agents and local law enforcement agents" as a bookmaker. A majority of the Court characterized this statement as a "bald and unilluminating assertion of suspicion" entitled to "no weight" in a probable cause determination.

US v. Harris, 403 US 573, 91 S Ct. 2075, 29 L Ed 723 (1971), did criticize this aspect of *Spinelli*, but a majority of the Court refused to join this part of the

Harris decision.[2] *Spinelli*, therefore, remains good law on this point. Unsupported claims of a person being known as a trafficker should be entitled to no weight.

At the Detroit Airport, Agent Hammonds saw the Defendant Oates and the unknown individual engage in conversatoin for 15 to 20 minutes. [*Id.*, at 26.] Agent Hammonds had observed Defendant Oates enter the first class section of a flight to New York; the unknown individual entered the coach section of the same flight. [*Id.*, at 27-28.] Since the two persons had not avoided each other in the airport, their split up suggests nothing "criminal" in nature. On the plane, Hammonds observed the unknown individual with a running nose and "what appeared to be" needle tracks on his hands. [*Id.*, at 30.] Aside from these indicia of possible status Agent Hammonds observed no suspicious activity on the plane. In New York both Defendants walked down the airport hallway together, again belying any suggestion of evasive action. [*Id.*, at 32.] Hammonds then observed the two people meet William McMillian, whom he "knew" to be associated with the drug culture in New York. Again,

---

[2] See Part II, joined by only Chief Justice Burger and Justices Black and Blackman.

of course, this testimony is nothing but a "bald and unilluminating assertion of suspicion." See *Spinelli, supra.*

It should be stressed that Agent Hammonds observed no suspicious activity. [*Id.*, at 56, 64.] At no time did he overhear suspicious conversation. And Agent Hammonds made no effort to keep the Defendants under surveillance in New York. [*Id.*, at 37.] At this point, therefore, we have nothing but association of an unknown person with two persons "known" to be involved in narcotics.

The next morning Agent Hammonds observed the Defendants back at LaGuardia, about to engage a flight to Detroit. [*Id.*, at 39.] Oates and the unknown person were seated across the waiting area from each other. The Defendant Oates was "looking in the direction of Daniels." [*Id.*, at 74, 82.] Agent Hammonds conceded that the Defendants did not make any "furtive movements" in the airport. [*Id.*, at 86.] Agent Hammonds then sat down next to the still unknown individual. He observed a "bulge" in that person's right hand coat pocket and another bulge on his thigh. [*Id.*, at 40.][3]

---

[3] The former bulge turned out to be a wallet, demonstrating that bulges can be, and perhaps usually are, consistent with innocent behavior.

On the basis of this evidence, Agent Hammonds decided to make an arrest. [*Id.*, at 41.]

In short, we have an overnight flight to New York by an unknown individual and a person suspected of drug involvement. Even ignoring *Spinelli's* admonition that unsupported suspicions of criminal involvement are entitled to no weight, we have nothing but guilt by association and bulges. Certainly an overnight trip to New York is not unusual in this day of common air travel. It bears repeating that the officials observed no furtive conduct, overheard no conversations and did not observe, or attempt to observe, the whereabouts of the Defendants in New York. These facts, therefore, do not come close to suggesting a "probability" of criminal conduct.[4]

The *Sibron* case, *supra*, strongly supports the above conclusion. In *Sibron* an official testied that he observed the defendant on the street over an eight hour period, during which time he engaged in conversation with

---

[4] In spite of the fact that there were some seven Government Agents involved in the arrest of Oates and Daniels, several of whom testified for the Government at the Hearing, the litany of their testimony is directly traceable only to Agent Hammonds. In essence, it was Agent Hammonds suspicions which the others ratified as their own.

six or eight persons whom the officer "knew" to be engaged in narcotics offenses. Toward the end of the period, the officer observed the defendant enter a restaurant and speak with three more "known" addicts. The officer then called the defendant outside and said "You know what I am after", after which the defendant immediately began reaching inside his pocket. The officer then thrust his hand into the pocket and retrieved heroin. The court, on these facts, quickly found an absence of probable cause:

> *The inference that persons who talk to narcotics addicts are engaged in the criminal traffic and narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. 392 US at 63, 20 L Ed 2d at 934.*

Interestingly, the court did not think that the defendant's action, including his hand in his pocket, when coupled with the eight hour observation, amounted to the requisite cause.

Henry v. United States, supra, also supports Appellant's position. In *Henry*, unlike the present case, a crime clearly had been committed before the Defendant's arrest: there, a theft of an interstate shipment of whiskey had

occurred. Moreover, the employer of one of the defendants had given information "implicating" the defendant with interstate shipments. The agents then twice observed the defendants loading cartons into a car from residential premises. On these facts, which are more specific than those in the present case, the court found a lack of probable cause.

In the court below the Government relied upon *United States v. Riggs, 474 F 2d 699 (2d Cir., 1973)*. This reliance is misplaced. Not only are the facts significantly different [see *infra*, at C], but the court's holding is irrelevant to the present issue. In *Riggs*, the court concluded that the Government had sufficient evidence for a *Terry* stop for identification purposes. As the defendant looked through her bag for identification, the officers observed in plain view a plastic bag containing white powder. Observation of the powder, with strong other indicia of criminal activity, provided probable cause for arrest. Hence, *Riggs* is a case in which probable cause developed during an intrusive, investigative stop. In the present case, the officers arrested the Defendants at the outset, after observing "bulges" not white powder.

In summary, the Government officials did not have probable cause to arrest the Defendants. Since the

evidence was uncovered in a search incident to an illegal arrest, the evidence should be suppressed.

C.

EVEN ASSUMING, CONTRARY TO THE TESTIMONY OF TWO GOVERNMENT AGENTS, THAT ONLY AN INVESTIGATIVE STOP OCCURRED, THE OFFICERS DID NOT HAVE A REQUISITE CAUSE TO JUSTIFY THE STOP.

As already indicated, two agents testified that they intended to arrest the Defendants at the outset. Nevertheless, even if this court were to consider the officers conduct as nothing more than an investigative stop, the officers did not have sufficient cause to justify such activity.

The starting point for this analysis must be *Terry, supra*. *Terry* for the first time authorized a Fourth Amendment seizure [a temporary seizure] on less than full probable cause. Because however, of a strong concern that a diluted probable cause requirement would render citizens subject to seizure at the uncontrolled discretion of police officers, the court established stringent criteria for even temporary street stops and limited frisks for weapons. The court specifically said that a Fourth Amendment intrusion, even a limited one, cannot be justified by "inchoate and unparticularized suspicion

or hunch." *392 US at 27, 20 L Ed 2d at 909.* Likewise, subjective good faith alone will not justify an intrusion. *392 US at 22; 20 L Ed 2d at 906.* Instead, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant the intrusion." *392 US at 21, 20 L Ed 2d at 906, emphasis added.*

In the present case, the officers certainly had inchoate suspicions. Indeed they undoubtedly entertained those hunches in good faith. But the hunches were no more than hunches. Without specific articulable facts a Fourth Amendment intrusion was unjustified. As indicated in the previous section of this argument, the officers' hunches were based on seeing an unknown person take an overnight trip to New York with a person suspected of narcotics involvement and on seeing the unknown person with some bulges in his coat pocket and pants.

Sibron demonstrates the importance of the articulable facts requirement. As set forth morely above, the officer in *Sibron* observed the Defendant continuously for an eight hour period conversing with several "known" addicts. Obviously the officer had a reasonable hunch that something was amiss, but the Court concluded that the officer did not have sufficient cause, based upon

specific and articulable facts, to justify a Fourth Amendment intrusion. See also *United States v. Brignoni-Ponce, supra.*

Further analysis of the so-called stop and frisk cases also supports the above conclusion. In deciding to authorize some Fourth Amendment activity on less than probable cause, *Terry* indicated that the reasonableness of police intrusions (other than full arrests and full searches) depends upon a balancing of the need for the intrusion against the invasion entailed by intrusion. *391 US 1, 20 L Ed 2d 905.* Justice Harlan noted that *Terry,* unlike *Sibron,* involve the possibility of a violent crime. The present case, like *Sibron* presents no facts indicating the Defendants were about to embark on a violent crime. In short, since a violent crime was not eminent, there can be no justification for a watering down of the *Terry* articulable facts requirment. (See also, *LaFave, supra, at 57.*)

As indicated in the previous section, the Government relied in the court below and this Circuit's decision in *Riggs* to support the officers' conduct in this case. *Riggs,* however, is clearly distingushable. In *Riggs,* a woman in Detroit purchased an airplane ticket to New York under the name of P. Griggs. When asked for identification under

airport security procedure (a procedure not involved in the present case), the woman produced a document bearing the name Fairh Riggs. In addition, and airline supervisor observed "stacks of money" in a brown paper bag the defendant carried. The defendant had indicated that the bag carried her lunch. Although the airline officials permitted the defendant to proceed to New York, they alerted the police, who ascertained that a woman by the name of Cynth[illegible] Griggs, also known as Betty Jackson, did have a narcotics record. (This, of course, is not the same as saying that a person is "known" to be involved in narcotics.) Later the same day, the defendant was again observed in New York buying a plane ticket back to Detroit. This time the ticket was purchased in the name of F. Riggs.

Hence, unlike the present case, the defendant purchased tickets under two different names on the same day. When stopped and asked for identification, the defendant produced documents bearing the name Farrah Jackson.

In *Riggs*, this court found a number of "specific and articulable facts" to justify the stop at a New York airport: large stacks of money in a paper bag; a false claim in Detroit that the bag contained "lunch"; a return to LaGuardia after two hours with a camera case

in addition to the brown paper bag; the use of two different names to purchase tickets, one name being P. Griggs; the actual existence of a criminal record for a woman named Cynthia Griggs. It should be emphasized, moreover, that the court used all these specific facts to justify only a stop for identification. Even after the defendant produced identification bearing a third name, Jackson, (it should be recalled that Cynthia Griggs had used Jackson as an alias), the officials still did not arrest the defendant. The more intrusive action of the arrest occurred only after the officers observed the white powder in plain view in the defendant's bag while she looked for identification. The admirable restraint in *Riggs* is in marked contrast to the intrusive seizure in this case--a seizure unsupported by facts nearly as strong as those in *Riggs*.

In short, the Government officials in this case did not have sufficient cause to justify even a *Terry* stop, let alone the intrusive seizure that actually occurred. Since the evidence was found in a search that derived from an unlawful stop, the evidence should have been suppressed.

D.

ASSUMING, CONTRARY TO THE ABOVE, A LAWFUL STOP, AND FURTHER ASSUMING, CONTRARY TO THE EVIDENCE, THAT THE OFFICIALS ENGAGED IN ONLY A FRISK, THE OFFICIALS DID NOT HAVE THE REQUISITE CAUSE TO JUSTIFY A PROTECTIVE FRISK FOR WEAPONS.

The Government apparently has forgotten that *Terry* did not authorize exploratory searches for evidence. Rather, *Terry* authorized only a limited frisk for weapons when an officer has reasonable grounds to believe, based upon specific facts that a person is armed and dangerous. *392 US 27, 20 L Ed at 889.* See also *Adams v. Williams, 407 US 143, 92 S Ct. 1921, 32 L Ed 2d 612 (1972)* (involving a concealed weapon).

In this case we have only Agent Hammonds' testimony that "over 50 percent" of narcotics arrests involve weapons.[5] Not one specific fact suggested that the

---

[5] Even this estimate of "over 50 percent" was materially compromised by Hammonds' testimony on cross-examination. On cross-examination he admitted that at the time of the incident in question he had only been involved in 15 to 20 arrests. That only three of these arrests were at an airport. He could not remember whether or not contraband had been discovered in those arrests at the airport. And he could not remember whether or not any weapons had been confiscated in those arrests. [Tr., Jan. 5, at 76-77.] In short, Agent Hammonds could testify to no experience of narcotics arrests at airports involving the finding of weapons. Given the security procedures which were present on April 27, 1972 in most airports and the notice that passengers may be subject to search for weapons, it is not unreasonable to presume that persons who were trafficking in narcotics would be the least dangerous of individuals and the less likely to be armed and dangerous.

Defendants were armed. The officers did not immediately search for weapons when they stopped Oates and Daniels. Instead, they took them to another room where they engaged in searches. Agent DeAlfi removed a wallet from Defendant Daniels' coat, saying only "I couldn't be quite sure what if was." [Tr., Jan. 5, at 152.] Agent DeAlfi then forced the Defendant Daniels to remove his pants and surrender a "bulge" underneath the pants at the right leg. [Tr., Jan. 5, at 153.] At no time did Agent DeAlfi say that the bulge felt like a weapon.

It should not even need arguing in this case that the federal officials were sea.ching for narcotics and not for weapons. To allow exploratory searches for evidence, not just weapons, is to undo the distinction *Terry* drew between ordinary searches and weapon searches. A weapon search, the court noted, "Is not justified by any need to prevent the disappearance of destruction of evidence." *392 US at 29, 20 L Ed 2d at 910-11.* Since the reason for the search is narrow, the scope of the search is accordingly narrow: a pat-down for weapons. A search for <u>evidence</u> cannot be narrow in scope. To use *Terry* to allow a search for evidence is necessarily to allow full searches on less than probable cause. This Court

has never condoned. Hopefully it never will.

Just last term of Court, the Supreme Court indicated that searches for evidence required full probable cause. In *United States v. Brignoni-Ponce, supra, at 2580,* the court applied *Terry* to justify the brief stopping of suspected illegal aliens on less than full probable cause. The court significantly added:

> *The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.*

Applying *Terry, Sibron and Brignoni,* the officers had no justification for searching for weapons in the present case. And more significantly, they had no right to engage in a search specifically aimed at finding narcotics rather than weapons.

II.

THE TRIAL COURT WAS IN ERROR WHEN IT DENIED THE DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY PERMITTING THE INTRODUCTION OF HEARSAY TESTIMONY CONCERNING THE CHEMIST ANALYSIS OF THE CHIEF EVIDENCE INTRODUCED BY THE GOVERNMENT.

INTRODUCTION

At trial, the Government sought to introduce evidence, the chemical analysis of the Government's Exhibit No. 1. The chemist, whom the Government alleged to have been responsible for the analysis, Milton Weinberg, was not present for testimony. The Government claimed that Mr. Weinberg had been available the week before for testimony but that he had become ill with a bronchial complaint. [Tr., Jan. 12, at 441-442.]

In the place of Weinberg's testimony, the Government brought on witness Harrington, a United States Customs chemist. Through her testimony, it introduced Government's Exhibit 12 and 13: Exhibit 12 being a conclusionary statement as to the analysis purportedly signed by Milton Weinberg; and Exhibit 13 being the handwritten notes allegedly made by Milton Weinberg at the time of his analysis of a sample of the material contained in Govern-

ment's Exhibit 1.

Mrs. Harrington made no claims to knowing Mr. Weinberg personally. In fact, she stated that by the time she came to work with the Customs Lab in New Yor, Mr. Weinberg had retired. She never observed Mr. Weinberg make any tests of any kind. [Tr., Jan. 12, at 465.] She never received any letters from him. She never received any notes from him. [Tr., Jan. 12, at 470-471.] She made no personal analysis of any of the material allegedly contained in Government's Exhibit 1. [*Id.*, at 468.]

Defense counsel made repeated objections to the testimony of witness Harrington and to the introduction into evidence of Government's Exhibit 12 and 13. Counsel pointed to the inherent untrustworthiness of the two exhibits by virtue of the fact that a most significant statement in Exhibit 12 had been struck through by a party unknown.

In response, the Government informed the Court that it would rely on the Federal Rules of Evidence, Rule 803(6), 803(24), 804(5). [*Id.*, at 443-444.] However, the Government's chief contention seemed to be that the testimony of evidence was admissible as a Business Record exception to the Hearsay Rule.

A.

A RECORD OF THE MATTERS OBSERVED BY POLICE OFFICERS OR OTHER LAW ENFORCEMENT PERSONNEL ARE EXCLUDED AS EXCEPTIONS TO THE HEARSAY RULE BY F.R.E. 803(8).

F.R.E. 803 relevant to public records and reports states:

> *(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) In civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted law, . . . (emphasis added).*

A legislative history of F.R.E. 803(8) is most significant. Debates in the House of Representatives on January 6, 1974, [Congressional Record pp. 563-565] clearly demonstrates the great concern of the House for maintaining the historical and constitutional right of confrontation in criminal cases. The text agreed to by the House on that date and subsequently full incorporated in the Federal Rules of Evidence by the Congress excludes from exceptions to the Hearsay Rule not only police officers' investigative reports, but also those of other

law enforcement personnel.[6]

When Representative Hungate explained the Conference Committee's report to the House he stated that as "the Rules of Evidence now stand, police and law enforcement reports are not admissible against defendants in criminal cases. This is made quite clear by the provisions of Rule 803(8)(b)(c)." [120 Congressional Record H-12254 (Daily edition, December 18, 1974).]

Thus, the plain reading of the Rule, together with its legislative history, demonstrates a firm congressional intent to prohibit the use of law enforcement personnel reports in the Government's case-in-chief. There would appear to be no need to argue that a United States Customs chemist falls within the "other law enforcement personnel"

---

[6] The Senate attempted to loosen the restrictions imposed by the House by offering a new rendition of Rule 804 (b)(5) entitled, *Criminal Law Enforcement Records and Reports.* In that proposed Rule the Senate would have added a new hearsay exception, not contained in the House bill, which would have provided that certain law enforcement records made by an officer-declarant not available would be admissible if his unavailability was due to death or physical or mental illness or infirmity or absence from the proceeding and the proponent of the statement "had been unable to procure his attnedance by process or other reasonable means." However, the Conference did not adopt the Senate amendment and preferred to leave the bill in the House version. [Congressional Record-House, December 14, 1974, H-11931-32.]

category. Obviously, the experimentation, observations, and conclusions of a Government chemist are central to the Government's case when possession of narcotics is at issue.

B.

ASSUMING ARGUENDO, THAT GOVERNMENT CHEMISTS' REPORTS ARE NOT INADMISSIBLE UNDER F.R.E. 803(8) THE REPORTS ENTERED AS EVIDENCE IN THE INSTANT CASE WERE NOT PROPERLY ADMITTED AS BUSINESS RECORDS UNDER 803(6).

In *United States v. Smith*, *521 F 2d 957 (D.C. Cir. 1975)*, the Court made a careful analysis of the case law governing police records and their admissibility as "Business Records."[7]

The issue in *Smith* was whether or not a police report could be admitted for impeachment purposes by the defense in a criminal matter. There, the police officer appeared for testimony and cross-examination; the defense sought to introduce a report which the officer had prepared. The trial court refused to admit the report.

---

[7] The Court also reviewed the application of F.R.E. 803(8), quoting extensively from the Congressional Record in footnotes, however, it did not decide the matter on the Rule. [*521 F 2d at 969.*]

The Court of Appeals said:

> *Our analysis thus produces the following rule: "Police reports are ordinarily excluded when offered by the party at whose insistence they were made," . . . but they may still be admitted as police records when, as here, they are offered against that party, the prosecution . . .* [*521 F 2d at 967.*][8]

In explaining the limits of its decision, the Court earlier said:

> *We do not hold that a police record is admissible in a criminal proceeding as a business record, either as such substantive evidence or for impeachment purposes, whenever the record meets the test of trustworthiness. We hold only that such a record is so admissible when offered by a criminal defendant to support his defense. We do not believe that such records maybe probably so employed by the prosecution.* [*521 F 2d at 965, emphasis is original.*]

The rationale for the *Smith* decision began with *Palmer v. Hoffman, 318 US 109, 63 S Ct. 477, 87 L Ed 645 (1943).* In *Palmer,* Mr. Justice Douglas, speaking for the majority, upheld the view expressed by this Court that a railroad company's records of railway accidents could not properly be admitted under the Business Records Act. Mr. Justice

---

[8] This is, of course, the essence of the relevant portions of Rule 803(8)(B)(C).

Douglas said:

> *The result would be that the Act would cover any system of recording events or occurences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such.*
>
> * * *
>
> *Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability.*
>
> * * *
>
> *Acquired from their source and origin and the nature of their compilatoin. Such a major change which would open wide the doors to avoidance of cross-examination should not be left to implication.* [*318 US at 113-114; 87 L Ed at 650.*]

The Rule in *Smith* recognized this *post litem motam* potential defectiveness.

Admittedly, distinctions have previously been made between types of police reports to determine admissibility. In *US v. Frattini, 501 F 2d 1234 (1974)* this Court was presented with a claim of error based upon the admission of a chemist's report. This Court stated that "the bare chemist's report was admissible under the Business Records exception to the Hearsay Rule," citing *United States v. Ware, 347 F 2d 698 (7th Cir., 1957).* In *Ware,* the Court found that the exhibits or memoranda made by the chemist were admissible "as having been made in the regular course of

business and that it was the regular course of business to make such memoranda or record of the findings of the chemist's analysis of the substance purchased from the defendant. [*Ware, supra, at 699.*] The Court also found that the exhibits satisfied the "underlying reason for this exception in the Hearsay Rule in the admission of this class of statements under Section 1732--the probability of their trustworthiness." [*Ware, supra, at 700.*] However, the exhibits made by narcotics agents were found to satisfy none of requirements of Section 1732. To these exhibits the Court said:

> *They are also subject to the objection that such utility as they possess relates primarily to prosecution of suspect lawbreakers, and only incidently to the systematic conduct of the police business. CF. Palmer v. Hoffman, supra.* [*Ware, supra, at 700.*]

These statements when taken in light of the concurring opinion of Judge Schnackenberg, are logically inconsistent. There is no doubt that the chemist who prepared the report of the analysis of the heroin did so primarily for the prupose of "prosecution of suspected lawbreakers." Judge Schnackenberg said:

> *I concede that the entries made by the chemist were admissible to prove the fact that he made analysis of the substance purchased from the defendant. However, I cannot concede that under either §1732 or §1733 what the chemist*

> *ascertained in making these analysis is proved by the entries in question which in effect states that the substances analyzed were heroin. Inasmuch as the chemist who made the analysis and the entries in question failed to testify and submit himself to cross-examination, the defendant at the trial was helpless because he had not way to determine whether proper methose of analysis were used and were free from error in their execution. There has been no case cited to us so extending the effect of §1732 or §1733. [Ware, supra, at 701.]*[9]

To assert that a Government chemist's report is admissible as a Business Record to prove that the substance which the Government alleges the Defendant possessed was in fact heroin without the Defendant being afforded the right of cross-examining that chemist is to relieve the Government of a most important requirement of proof and to effectively tie the hands of the defense in the presence of a bald assertion contained on a piece of paper by an unknown Government agent.

In the instant case, however, we are not presented with a "bare chemist's report" [*Frattini, supra*] the Government's evidentiary problem was quite complex. It had two exhibits, 12 and 13. Prior to trial it had

---

[9] That confrontation of the Government chemist in cross-examination can be a most important factor to the defense may be seen in: *Berheim, David; DEFENSE OF NARCOTICS CASES, See Chapter Four, Matthew Bender, 1975 Revision.*

submitted a copy of the chemist's report [Exhibit 12] to the defense. This report was unsigned. It was only after demand was made by counsel immediately prior to the calling of witness Harrington that the Government provided a signed copy.[10] It provided a copy of Exhibit 13 only during the examination of witness Harrington.

As between the two exhibits, there was a significant conflict. A sentence pertaining to the receipt and disposition of the evidence had been struck out by an unknown person on Exhibit 12. [Tr., Jan. 12, at 461-464.] The Government attempted to explain the discrepancy, but no testimony was received nor could it be received in the absence of Milton Weinberg. (It is to be noted that Exhibit 12 was prepared after Exhibit 13. Exhibit 12 is a conclusionary statement.)

Further, while witness Harrington testified that she could recognize the handwriting of Milton Weinberg, she in effect also testified that she had never seen him write, she had never received any letters or notes from him, and that in point of fact, she had come to work at the Customs Lab after Weinberg had retired.

---

[10] The Government offered no explanation as to the absence of the signature on the defense copy.

As to Exhibit 13, which Harrington said were the handwritten notes of Weinberg, she testified only in a very general manner as to the tests that he performed in arriving at his conclusions.

Finally, demonstrating how easy it is for even an "expert" well experienced in courtroom procedure and testimony to make a mistake, Mrs. Harrington testified that she thought that she had performed tests of her own on the particular substance contained in Government Exhibit 1. It was only after counsel pressed the matter and called her attention to the absence of her initials on the package, that she admitted that she had made a mistake: she had not performed any tests on the substance. [Tr., Jan. 12, at 470-471.] Thus proving the wisdom of Mr. Johnson of Colorado when he said in the debates in the House of Representatives:

> *I was a prosecutor in a state court, and there were so many cases where good cross-examination indicated a lack of investigative ability, on the part of the man who made the report that I became more and more convinced that good cross-examination was one of the principle elements in any criminal trial.* [*Weinstein's Evidence, at 803-18, Matthew Bender 1975.*]

The net result of the Government's procedure at trial and the admission of the testimony of witness Harrington was to present the defense with a situation in which

the alleged reports of Weinberg were introduced into evidence compounded by attempts on the part of witness Harrington to try to interpret those records. Hearsay was thus compounded by speculation to the great detriment of the Defendant's cause.

It goes without saying that Defendant's objections to a lack of "chain of custody" proof by the Government under these circumstances was denied. Central to the issue of "chain of custody" would necessarily have been the testimony of the chemist who received the evidence for analysis. Absent the opportunity to confront that witness the issue of "chain of custody" became moot.

III.

THE TRIAL COURT WAS IN ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE PRESUMPTION OF INNOCENCE CONTINUED WITH THE DEFENDANT THROUGHOUT THE TRIAL AND INTO ITS DELIBERATIONS.

In *Coffin v. US, 156 US 432 39 L Ed 481 (1894)* the Court stated:

> *The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. [156 US at 453, 39 L Ed at 491.]*

In *United States v. Fleischman, 339 US 349, 363, 94 L Ed 906, 915,* the Court stated:

> *Respondent does not lose the presumption of innocence. It surrounds the defendant at a criminal prosecution. The presumption continues to operate until overcome by proof of guilt beyond a reasonable doubt . . . It has also been said, 'The presumption of innocence attends all proceedings against the accused from their initiation until the result in a verdict which either finds him guilty or converts the presumption of innocence into an adjudged fact.' [29 Am Jur 2d 276.]*

It is agreed that the instructions to the jury are to be viewed in their entirety. [*Stump v. Bennett, 398 F 2d 111 (8th Cir., 1968).*] It is further agreed that if

the substance of the requested instruction ca' in fact be found in the instruction as given, no error results. *US v. Macke, 159 F 2d 673, 673 (1947).*

With this in mind, we look at the instruction on presumption of innocence as given by the Court:

> *A defendant is presumed innocent of a crime. Thus the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused, so that the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.* [*Tr., Jan. 14, at 687.*]

It was held in *Holt v. US, 54 L Ed 1012 at 1028,* that an instruction very similar to the one given by the trial court in the instant case was satisfactory.

However, in the conference for discussion of the instructions, an objection was entered by counsel to this particular charge asking that the Court instruct the jury that the presumption of innocence remains throughout the deliberation until such time as the jury unanimously agrees that he is guilty. To this the Court responded:

> *I will not charge in that fashion. The presumption of innocence is rebutted by*

> *each and every fact that the prosecutor presents to the jury. It is rebutted by and every time the prosecutor shows facts and circumstances under which a juror makes a consideration.*
>
> *I will not charge that the presumption of innocence continues throughout the trial. It is always the presumption of innocence, but it is rebutted every time a fact is raised to the prosecution every time.* [*Tr., Jan. 13, at 547-548.*]

The Instruction, when viewed in light of the Court's "in chambers" explanation, demonstrates the great difficulty in a proper statement of the presumption. Logically, if the presumption of innocence is "rebutted every time a fact is raised through the prosecution every time," the presumption is a weak sister indeed.

Under this theory, where is the place of cross-examination and what is its purpose?

Obviously, the danger which counsel saw in the Instruction was fully supported by the trial court's flat assertion that the "presumption of innocence is rebutted by each and every fact that the prosecutor presents to the jury."

On the contrary, the presumption of innocence--far from being rebutted by every fact presented by the prosecution--is the constant prism through which all evidence is to be seen. *Wigmore* states the pro-

position in this fashion:

> *. . . the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocenc, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, nothing but the evidence, i.e., no surmises based on the present situation of the accused. This action is indeed particularly needed in criminal cases.* [*Wigmore on Evidence, Little Brown & Company, 1940, Vol. IX,* §*2511, at 407.*]

We submit that the trial court more than adequately demonstrated what its "clean slate" theory of the presumption of innocence really meant. We submit that the court was in error in not providing a clearer, more exact, Instruction to the jury in this matter.

RELIEF REQUESTED

WHEREFORE, Paul V. Oates, Defendant-Appellant, prays this Court to reverse the judgment of conviction entered against him in the court below and grant him a new trial.

Respectfully submitted,

TALBOT, GRANT & McQUARRIE

By: _____
JAMES HOWARD GRANT
Joseph Grano, of counsel
5th Fl., American Title Bldg.
139 Cadillac Square
Detroit, Michigan 48226
(313) 963-6969

Dated: May 21, 1976

76-1100

APPENDIX

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	DESCRIPTION
5/04/72	Indictment Returned.
11/27/75	Motion for Suppression of Evidence by Defense.
1/05/76	Pre-Trial Hearing on Motion to Suppress begins. Adjourned to January 6, 1976.
1/06/76	Hearing on Pre-Trial Motion continues. Motion denied. Jury trial begins. Adjourned to January 7, 1976.
1/07/76	Jury trial continues. Adjourned to January 8, 1976.
1/08/76	Jury trial continues. Adjourned to January 9, 1976
1/09/76	Jury trial continues. Adjourned to January 12, 1976.
1/12/76	Jury trial continues. Adjourned to Janury 13, 1976.
1/13/76	Jury trial continues. Adjourned to Janury 14, 1976.
1/14/76	Jury deliberates. Jury verdict, filed and entered.
3/03/76	Commitment Order, filed and entered. Defendant is committed to the

DATE	DESCRIPTION
	custody of the Attorney General for a period of 8 years plus a special parole of 5 years on Count (I), and Count (II) Defendant is sentenced to a term of 8 years plus special parole of 5 years. Sentence on Count (II) to run concurrent with sentence imposed on Count (I). Defendant is to receive credit for all time previously served in connection with this offense. Bail fixed at $35,000 surety bond pending appeal, Defendant permitted to return to Detroit, Michigan.
4/02/76	Notice of Claim of Appeal filed.

RJB:JW:mc
F.#723,111

720 CR 721

MAY 4 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- against -

ISAAC DANIELS and
PAUL V. OATES,

Defendants.

- X

INDICTMENT

Crim. No.
(T. 21, U.S.C., §841(a)(1), §846 and T. 18, U.S.C., §2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 26th day and 27th day of April 1972, in the Eastern District of New York, the defendant ISAAC DANIELS and the defendant PAUL V. OATES knowingly and intentionally conspired to possess, with intent to distribute about 485 grams of heroin hydrochloride, a schedule I narcotic drug controlled substance. (Title 21, United States Code, §846)

COUNT TWO

On or about the 27th day of April 1972, in the Eastern District of New York, the defendant ISAAC DANIELS aided and abetted by the defendant PAUL V. OATES knowingly and intentionally did possess with intent to distribute about 485 grams of heroin hydrochloride, a schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code, §2)

A TRUE BILL

FOREMAN

3-A

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

DECISION OF THE COURT ON MOTION TO SUPPRESS

The Court has heard all of the evidence and heard counsel and considered this matter. We have all had time to go over it and consider it individually.

Now the Court, in part, relies on Terry against Ohio. That is 392, U.S. at Page 5. Now, from this particular case and under the circumstances the actions of Agent Hammond were fully justified by the public interest in affecting crime prevention and protection. In Terry versus Ohio at 392, U.S. at Page 22 it sets forth it was this legitimate investigative function the officer was discharging when he decided to observe the defendant and his companions. He observed the defendant go through a series of acts,some of them perhaps innocent in and of itself, but which were, when taken together, warranted further investigation.

The Terry court acknowledging the legitimate investigative function which the officer was fulfilling noted that before a stop is justified the police officer must be able to point to specific and articuable facts which taken together with rational inferences from those facts reasonably warrant an intrusion.

Now on Page 21 of Terry it sets forth in making

that assessment, it is imperative that the facts be judged against an objective, with the facts available to the officer at the moment of the seizure or search warrant have reasonable caution in the belief that the actions taken were appropriate. Once the official intrusion or stop of the defendant is justified it is incumbent upon the court to recognize the legitimate need of the officer to exercise self-protective care in the pursuance of those duties which invite danger to his person.

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Now in this hearing which is before the Court, Agent Hammond sat next to Daniels in the departure lounge. He observed that the right pocket of Daniels' jacket or coat had a bulge and that the inside of his leg also had a bulge in it as if to be concealing something in these two areas. Hammond testified and believed that by virtue of the bulge in the right

pocket of Daniels and the bulge on the right leg of Daniels that Daniels was possibly armed and carrying drugs and believed at that point there was probable cause sufficient to merit him to arrest Daniels and Oates. An arrest was made of Daniels and Oates by the United States Customs security officers. The Court feels that the search and seizure in this case and the subsequent arrest was proper based on the surveillance conducted by Agent Hammond and the many things and actions that he had caused to observe these two men do, from the surveillance, beginning in Detroit and continuing the next day in New York City. There was probable cause for Hammond to feel that a crime had or was being committed and that Oates and Daniels were involved in that crime.

The motion to suppress by the defendant is denied and it is also denied as to the statements [illegible] made by the defendant Oates.

United States of America vs.

United States District Court for

AMENDED JUDGMENT & COMMITMENT

EASTERN DISTRICT OF NEW YORK

DEFENDANT: PAUL OATES

DOCKET NO.: 72-CR-501

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: 3 DAY: 3 YEAR: 1976

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL JAMES GRANT, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. Counts 1 and 2

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.C. Secs. 841(a)(1) 846 and T-18 U.S.C.Sec. 2, in that on or about and between April 26 and April 27, 1972, the defendant, with another, did conspire and did knowingly and intentionally possess about 485 grams of heroin hydrochloride with intent to distribute

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of _____

8 years plus a special parole term of 5 years on count (1), and on count (2) defendant is sentenced to a term of 8 years plus special parole term of 5 years. Sentence on count (2) to run concurrent with sentence imposed in count (1). Defendant is to receive credit for all time previously served in connection with this offense. Defendant advised of his right to appeal. Bail fixed at $35,000.00 Surety Bond pending appeal. Defendant permitted to return to Detroit, Michigan.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

RECEIVED

MAR 5 1976

TALBOT, GRANT & McGUARRIE

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE 3-3-76

BY _____ ( ) CLERK ( ) DEPUTY

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Henry Bramwell

Date Mar 3, 1976

EXCERPT OF PROCEEDINGS

[NOT SEPARATELY PAGINATED]

men.

I will now give you the charge of the court.

Madaam Forelady, ladies and gentlemen of the jury:

We now come to the final state of the proceedings. The court will now charge you on the law to be applied to the facts in the case.

As you may recall, I initially gave you a pre-charge as to the manner in which the case should be presented to you. I told you that most of the evidence in the case would come in the form of the testimony of witnesses, and that you were to pay special attention to the manner in which the witnesses testified.

I believe I also instructed you that you would be the judges of the facts in the case, that being your sole province; and that your recollection of the facts after having heard all of the evidence in the case -- the testimony of witnesses and documentary proof -- was to control the determination of the issues.

Likewise at that time I told you that I would be the judge of the law. This has not changed at this state of the proceedings. I will not review the facts in this case for you because I am certain

that with summations by the attorneys there is no need for the court to review the facts. In any event, if you find that there is some fact in the case that you may have forgotten or don't recollect, or you can't agree with each other in your deliberations, you can have it read back from the record, and that will, I am sure, refresh your memory.

In any event, I am the judge of the law. You must accept what I say to be the law in this case.

Now, the attorneys have been permitted by the court and by the rules to make opening statements and summations to you. Under no circumstances are the statements they have made by way of opening or by way of summation to be taken as evidence. However, the court and the law does permit you to take the arguments that they have proffered before you and weigh those arguments. And if you agree with what they have said on either side of the case you may use those arguments in your deliberations and in discussing the case with each other, and try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not

commensurate with the testimony and the proof in the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you may discuss that portion of it if you so desire.

Now, of course, I also said to you that during the trial the court will be the judge of the law. Likewise, as to motions which at times we had at a side bar, as you may recall. That was not for the purpose of keeping any of the proof from you, but were matters of law that were discussed between the attorneys and the court itself and should not have come before you. In any event, if you feel that you have discovered by some stretch of your imagination what this court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I tell you here and now I have come to no conclusion in this case nor have I indicated to you in any way whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendant. That is your province and your job. You should not try to weigh

what you believe the court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent and they have a right to exercise as much forcefulness as they desire in their understanding or otherwise in presenting their case. I say this because this is within the framework of the ordinary trial.

In determining the facts, the jury is reminded that before each member was accepted and sworn to act as a juror, he was asked questions regarding his competency, qualifications, fairness and freedom from prejuidice or sympathy. On the faith of those answers the juror was accepted by the parties. Therefore, those answers are as binding on each of the jurors now as they were then and should remain so until the jury is discharged from consideration in this case.

Now, you cannot decide that you do not like the sections of the law that I will quote to you or any other part of the charge. You have the obligation of accepting the law as I charge it, just as I have the obligation of accepting your findings of fact in your ultimate verdict as to

guilt or innocence of each defendant as to each charge.

It lends for predictability and stability if judges throughout the country in types of charges such as this, charge uniformly or substantially so and that juries accept it. It would be unfair for you to decide this case on your own notions on what the law should be, and another jury decided on their own notions on what the law should be.

That is why the obligation is a firm one and one that you should understand.

Of course, you know by this time that this case has come before you by way of an indictment presented by a Grand Jury sitting in this Eastern District of New York. That indictment charges the defendant with the count I shall now read to you. Remember, the indictment is merely an accusation, merely a piece of paper. It is not evidence and is not proof of anything.

The indictment reads as follows:

Count One: " On or about and between the 26th and 27th day of April, 1972, in the Eastern District of New York, the defendant Isaac Daniels and the defendant Paul V. Oates, knowingly and

intentionally conspired to possess, with intent to distribute about 485 grams of heroin hydrochloride, a schedule I narcotic drug controlled substance in violation of Title 21, United States Code, Section 846.

Count Two.

On our about the 27th day of April 1972, in the Eastern District of New York, the defendant Isaac Daniels aided and abetted by the defendant Paul V. Oates knowingly and intentionally did possess with intent to distribute about 485 grams of heroin hydrochloride, a schedule I narcotic drug controlled substance in violation of Title 21, United States Code, Section 841 (a) (1), and Title 18, United States Code, Section 2.

As to the statute of this Count Two of the indictment, Count Two of the indictment is based upon Title 21 of the United States Code, Section 841 (a) (1), which reads in pertinent part as follows:

"It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute or dispense a controlled substance."

You are instructed as a matter of law that heroin hydrochloride is a controlled substance.

Essential elements:

Count Two of the indictment charges that Isaac Daniels, aided and abetted by the defendant, Paul V. Oates, possessed with intent to distribute approximately 485 grams of heroin hydrochloride, on or about April 27, 1972.

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt are:

First: That Isaac Daniels, aided and abetted by the defendant Paul V. Oates, on or about April 27, 1972, possessed a quantity of heroin hydrochloride, a controlled substance.

Second: That Issac Daniels, aided and abetted by the defendant Paul V. Oates, on or about April 27, 1972, possessed the heroin with the specific intent to distribute it, and

Third: That Isaac Daniels, aided and abetted by the defendant, Paul V. Oates, did so knowingly and and intentionally.

As stated before, the burden is always on the government to prove beyond a reasonable doubt every essential element of the crime charged.

Bear in mind the following definitions in considering the essential elements of the crime c

charged."

(1) "Possession": The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intent, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

(2) "Knowingly":

An act is done knowingly if done voluntarily

and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

(3) "Distribute" The term "distribute" means to deliver a controlled substance to the possessor of another person, which in turn means the actual, constructive, or attempted transfer of a controlled substance.

Aiding and abetting is dealt within Section 2 of Title 18 of the United States Code which reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

" Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

"Thus, the guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

"Aid and Abet"-Defined

In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or ommission of his to make the criminal venture succeed.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

You of course may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

" Mere Presence" Not Sufficient

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond reasonable doubt that the defendant was a participant and not merely a knowing spectator.

"While mere coincidental presence at the scene of a crime is insufficient to establish participation ... evidence of an act of relatively slight moment may warrant a finding of participation in a crime and that participation may be framed by circumstantial evidence."

To determine whether a defendant aided and abetted the commission of an offense, you ask yourselves these questions: Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his action to make it succeed? If he did,

then he is an aider and abettor.

The evidence must be proved by the government beyond a reasonable doubt.

As I mentioned earlier Count One of the indictment charges that on or about and between the 26th and 27th days of April, 1972, the defendant Paul V. Cates conspired and agreed with Isaac Daniels to possess with intent to distribute approximately 485 grams of heroin hydrochloride.

Count One of the indictment is based upon Section 846 of Title 21 of the United States Code. That section provides that any person who conspires to commit the offense of possessing with intent to distribute a controlled substance shall be guilty of an offense against the laws of the United States. Again, you are instructed as a matter of law that heroin hydrochloride is a controlled substance.

Proof of Existence and Conspiracy Definition.

A conspiracy is a combination of two or more persons, by consorted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in a criminal purpose", in which each member becomes the agent of every other member. The gist of the offense, is a combination or agree-

ment to disobey, or to disregard the law.

Mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, expressly or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy, nor that all means or methods, which were agreed upon, were actually used or put into

operation, nor that all of the persons charged to have been members of the alleged conspiracy were such. What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed by two or more persons, including the accused.

Proof of Membership in Conspiracy.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally, and

with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So, if a defendant or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant - a conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular individual was a member of the conspiracy, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed beyond a reasonable doubt, and that he was one of its members.

Essential Elements:

It is not necessary in order for the government to prove its case of a conspiracy to violate the narcotics law, that there be proof of actual dealings in narcotics. Again, Count One of the indictment charges that on or about and between the 26th and 27th days of April, 1972, the defendant Paul Oates conspired and agreed with Isaac Daniels to possess with intent to distribute approximately 485 grams of heroin hydrochloride. The essential elements of this offense, each of which the government must prove beyond a reasonable doubt are:

First: That the conspiracy described in the indictment was willfully formed; and was existing at the time alleged, namely on or about and between the 26th and 27th days of April, 1972, and

Second: That the defendant Paul V. Oates willfully became a member of the conspiracy.

If the jury should find beyond a reasonable doubt from the evidence in the case that the existence of the conspiracy charged in the indictment has been proven, then proof of the conspiracy offense charged is complete.

Definition of Specific Intent - Applicable to all offenses charged in the indictment.

The crime charged in this case are serious crimes which require proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by a defendant, and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Reasonable Doubt:

Now, there are in many cases, and in this one, two types of evidence from which a jury may properly find a defendant guilty of a crime, one is

di

direct evidence such as testimony of an eyewitness, the other is circumstantial evidence which is proof of a chain of facts and circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

A defendant is presumed innocent of a crime. Thus the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused, so that the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt, and reasonable doubt is based upon reason and common sense, the kind of doubt

that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

You, the jury, will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So, if the jury views the evidence in the case as reasonably premitting either of two conclusions, one of innocence, the other of guilt, you, the jury, should, of course, adopt the conclusion of innocence.

I have said that the defendant may be proven guilty either by direct or circumstantial evidence. I have said that direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Also circumstantial evidence is proof of a chain of facts and

circumstances indicating the guilt or innocence of a defendant. You, the jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence.

The test is one of reasonable doubt, and should be based upon all the evidence, the testimony of witnesses, the documents offered into evidence and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which have been proved. You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

A reasonable doubt may arise not only from the evidence produced, but also from the lack of evidence. Since the burden is upon the prosecution

to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosection to establish such proof.

Proof of Knowledge and Intent

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowlege and intent may be inferred from all the surrounding circumstances.

As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable, or ordinary, consequences of his act.

Credibility of Witnesses.

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves, and it goes without saying that you should scrutinize all the testimony

given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he as testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure to recollect, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether

the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves. Another test that you can use in determining the truthfulness or credibility of a witness is to use your own good common sense in addition to these essentials that I have given you. You can use your good common sense as you do in your everyday experience where you must make important decisions based upon what others tell you. When you decide to either accept or ignore the statements of others you use your common sense. Your good judgment will say to you somehow or other that whatever they say does not appear to be truthful, that somehow or other you just do not believe what they have said. That is your ability to reason, your ability to determine the truthfulness of the person you are speaking with. Likewise, your common sense should be used in determining the weight to be given the testimony of a witness.

You take that same good common sense into the jury room, you do not leave it outside. In addition to what I have said, you use your common

sense as a test in exercising your good judgment and in determining whether or not this defendant is guilty of the crimes charged. It is for you to determine whether the witnesses in this case have testified truthfully, whether or not they have an interest in the case, what that interest may be and how great it is and whether or not they have told you falsehoods. This is all for you to determine.

Every witness' testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case then the law gives you certain privileges. One of those priviliges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which was false, then the law allows you to take the portions which were true and weigh it and disregard those portions which were false. That again is within your perogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all of the facts and circumstances in evidence in determining

which of the witnesses are worthy of greater cred[illegible]. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

You are not obliged to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness' bearing and demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

The government is not required to prove the essential elements of the offense as defined in these instructions by any particular number of witnesses.

The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth.

Impeachment-Inconsistent Statements.

The testimony of a witness may be discredited or impeached by showing that he previously made

statements which were inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have the right to distrust such witness' testimony in other particulars; and you may reject all the testimony or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The probable truthfulness and believability of every witness is for you, and for each of you to decide; that I have already instructed you. The fact that such witnesses come before you as government agents should not in the least change your attitude in this respect. Their testimony does not deserve either greater or lesser

believability, simply because of their official status.

Whether you do, or do not, believe any witness must depend upon how truthful you judge that witness to be after you have heard the testimony and formed your own conclusions as to the witness' believability.

Informants Testimony:

You have heard the testimony of William McMillan, who, at certain times, has acted as a paid informant for the government. The law does not prohibit the use of informers, but whether you approve of their use is not to enter into your consideration of this case. The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. It is for the jury to determine whether an informer's testimony has been affected by interest, or by prejudice against the defendant.

Impeachment - Conviction of a Felony.

The testimony of a witness may be discredited or impeached by showing that the witness has been

convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

Effect of Failure of Accused to Testify:

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Extra Judicial Statements or Conduct.

Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside of court, and after a crime has been committed, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a

reasonable doubt that the statement or act or omission was knowingly made or done.

A statement or act or omission is "knowingly" made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether any statement or act or omission claimed to have been made by a defendant outside of court, and after a crime has been committed, was knowingly made or done, the jury should consider the age, sex training, education, occupation, and physical and mental condition of the defendant, and his treatment while in custody or under interrogation, as shown by the evidence in the case; and also all other circumstances in evidence surrounding the making of the statement or act or omission, including whether, before the statement or act or omission was made or done the defendant knew or had been told and understood that he was not obligated or required to make or do the statement or act or omission claimed to have been made or done by him; that any statement or act or omission which he might make or do could be used against him in court; that he was entitled to the assistance of counsel before making any

statement, either oral or in writing, or before doing any act or omission; and that if he was without money or means to retain counsel of his own choice, an attorney would be appointed to advise and represent him free of cost or obligation.

If the evidence in the case does not convince beyond a reasonable doubt that an admission or statement was made voluntarily and intentionally you should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that an admission or statement was in fact voluntarily and intentionally made by a defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the admission or statement.

Exculpatory Statements-Later Shown False:

Conduct of a defendant, including statements knowingly made and acts knowingly done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence.

When a defendant voluntarily and intentionally

offers an explanation, or makes some statement tending to show his innocence, and his explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to such evidence, are matters exclusively within the province of the jury.

A statement or an act is "knowingly" made or done, if made or done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The jury will always bear in min d that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Judging the Evidence:

There is nothing peculiarly different in the way a jury should consider the evidence in a

criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good common sense; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond reasonable doubt say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Jury's Recollection Controls:

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Punishment:

Now, under your oath as jurors you cannot allow a consideration of the punishment which may be inflicted upon the defendant, if convicted, to influence your verdict in any way or in any sense enter into your deliberations.

The duty of imposing sentence rests exclusively upon the court. Your function is to weight the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence, and the evidence alone, and you must not be influenced by any assumption, conjecture, or sympathy, or any inference not warranted by the facts until proven to your satisfaction.

Unanimous Verdict:

Now, in this type of case there must be a unanimous verdict, that means all twelve of you must agree, and it goes without saying, that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether at least you can with good conscience agree with him. You have no right to stubbornly

and idly sit by and say, " I am not talking to anyone", " I am not going to discuss it" because people with common sense and the ability to reason must communicate, they must communicate their thoughts. So, anything which appears in the record and about which one of you may not agree - talk it out amongst yourselves and then if you can't agree as to what is in the record, well, you can ask the court to have that portion of the testimony read back to you.

You may do so by knocking on the door and giving a note in writing to the U.S. Marshall who will then present it to the court, and I will then bring you into the courtroom.

The forelady will preside over your deliberations, and will be your spokesman here in court.

As to the form of the verdict, as to Count One, it is not guilty or guilty. As to Count Two, not guilty or guilty.

I may say this, too, all the evidence including the Exhibit number 1 will be sent in to the jury room to be used in your deliberations. Exhibit 1 which is the heroin is sealed and, please, do not open it in the jury room.

I will also send in a copy of the indictment

so that the jury may have the two counts for use during the deliberations.

I will see the attorneys at the side bar.

(Whereupon the attorneys and the Court Reporter conferred with the court at the side bar).

THE COURT: I will take the exceptions, please.

MR. GRANT: Your Honor, only with reference to aiding and abetting, the court, if I am correct, instructed the jury that they should find that Isaac Daniels knowingly possessed and that Paul Oates aided and abetted him.

THE COURT: Do you want me to charge them in that fashion?

MR. GRANT: No, Sir, I do not. The point is that they must find that Paul Oates knowingly aided and abetted. The issue is not Isaac Daniels possessed, but Paul Oates knowingly aided and abetted. The issue is not at all whether Isaac Daniels did or did not do.

THE COURT: Paul Oates knowingly aided and abetted --

MR. GRANT: Fine. Without any reference to Isaac Daniels.

THE COURT: There has to be reference to him

because the evidence is to that effect.

MR. GRANT: Now, as to the definition of conspiracy, Your Honor, as I understood it yesterday you had agreed to define it as a combination or agreement.

THE COURT: We went through that and I did it exactly as I gave it to you yesterday.

MR. GRANT: Yes, I was objecting to the use of the words comnination or agreement.

THE COURT: That is correct.

MR. GRANT: I was asking that it only be an agreement. Today it came out as a combination.

THE COURT: I gave it as I said I would yesterday.

MR. GRANT: Sir, may I ask the Court Reporter to read it back?

THE COURT: I will read the first paragraph. I will read it rather than have the Court Reporter go through all of his notes.

MR. GRANT: I am confident that the record will show that the court said it is a combination.

THE COURT: It is the combination or agreement.

MR. ROCCO: I remember hearing a combination or agreement.

MR. GRANT: Well, the record will show what is there.

THE COURT: Yes.

Go ahead, Mr. Grant.

MR. GRANT: This question of whether or not there need not be proof of actual dealing in narcotics --

THE COURT: You are already taking an exception.

MR. GRANT: I take an exception again that the government in determining its case, and while there may be in theory no need for showing the fact or facts that the government has ventured to show an overt act, and an overt act does become essential.

MR. ROCCO: Your Honor, it is absolutely not the position.

THE COURT: You have your exception for the record.

MR. GRANT: As to the matter of presumptions of innocence, I am sorry, at this point having no copy of the court's charge, it is difficult to say, but we take exception to the court's charge with the number of witnesses and the weight to be given since no witnesses were called by the defense, and I think the fact that the court upon calling it to

the attention that the weight to be placed upon the number of witnesses is comprimising the situation of the defense so far as we had no witnesses to call.

THE COURT: All through the charge I said the defense is not required to call any witnesses. That goes in all the charges.

MR. GRANT: I realize that, Sir, but I simply do not agree, and no court can make me agree personally. That is the charge that can be separated into bits and pieces --

THE COURT: There is no question that I can't tailor this charge to presume only the innocence of your client. I can't do that. I have to try to balance the charge, and the court has done the best it can. I am sorry that the tailoring doesn't fit the suit you want to wear.

MR. GRANT: I don't want the jury to hear these remarks.

THE COURT: But I can't do that, Mr. Grant, and you should realize that.

MR_ GRANT: I am not asking you to tailor anything. All I am asking you to do is to make sure that the charge is as explicit as possible.

THE COURT: The jury can hardly hear these

remarks. I am speaking very soft, and the jury can't hear these remarks. There are less than two feet between you and I and I am speaking very slowly and very softly.

MR. GRANT: As to the treatment of evidence, I am concerned about that. I did not hear this yesterday. I am concerned as to the problem between the treatment of evidence and reasonable doubt, and the previous statement of reasonable doubt.

THE COURT: I went all over that with you yesterday.

MR. GRANT: The treatment of the evidence?

THE COURT: Yes, I went through the entire thing.

MR. GRANT: Well, I didn't hear the specific charge on the treatment of evidence I don't believe.

THE COURT: That is in the reasonable doubt area.

MR. GRANT: No, Sir, that is especially towards the end.

THE COURT: I went over every bit of this yesterday, -- are you talking about the weight of the evidence?

MR. GRANT: The weight of the evidence. Juding the evidence.

THE COURT: I didn't go over this with you?

MR. GRANT: No, Sir, I don't believe you did.

THE COURT: If I didn't --

MR. GRANT: Sir, the words, "that you treat any person depending upon the evidence presented to them," no, Sir, the definition which you gave of reasonable doubt as to that was in the more important affairs. It isn't a question of how they treat any question, but those of which are the most important of their ordinary affairs.

THE COURT: I gave them that.

MR. GRANT: I say this is contradictory to the charge you gave.

THE COURT: Well, I have your exception. Anything else? Aiding and abetting, and the reference is specifically that Oates knowingly aided and abetted that is what they must find.

MR. GRANT: CAn I see your instruction on aider and abettor.

THE COURT: Yes, it is the next page.

MR. GRANT: Yes.

THE COURT: And you want to go further into the explanation?

MR. GRANT: Yes, Sir. It is not the knowledge

of Isaac Daniels. The issue here is not the knowledge of Isaac Daniels, it is the knowledge of Paul Oates

THE COURT: And you take exception to that? I will note your exception for the record.

MR. ROCCO: May I see that for a moment, Your Honor.

THE COURT: Yes.

MR. ROCCO: I would have no objection.

THE COURT: How do you want this to read?

MR. GRANT: It is not the knowledge of Mr. Daniels.

THE COURT: All right. For Mr. Daniels there is no contest.

MR. GRANT: The exceptions which were noted at the conference in chambers yesterday I want those to continue.

THE COURT: Yes.

MR. GRANT: Thank you, Sir.

(Whereupon, the conference at the side bar concluded).

THE COURT: Ladies and gentlemen of the jury, the essential elements as to aiding and abetting, the court incorrectly charged that, and it should be as to the third element of the offense

it should be that Paul V. Oates aided and abetted Isaac Daniels and did so knowingly and intentionally. It is Paul V. Oates who knowingly and intentionally aided and abetted in connection with your deliberations. That is as to Count Two of the indictment.

MR. GRANT: May we come back?

THE COURT: Yes, sir.

(Whereupon the attorneys and the Court Reporter conferred with the court at side bar).

MR. GRANT: The phraseology that you used as I understand that you were posing some questions --

THE COURT: Those are the essential elements, the third essential element.

MR. GRANT: Maybe I am incorrect on that. But the question is did Paul Oates knowingly aid and abet. The issue is not, I respectfully request that the court call to the attention of the jury the fact that the issue is not what Isaac Daniels did, it is what Paul Oates knowingly did.

THE COURT: All right.

(Whereupon the conference at the side bar was concluded).

THE COURT: Ladies and gentlemen, the issue is not what Isaac Daniels did, it is did Paul Oates

knowingly aid and abet in connection with Count Two of the offense.

Anything further, Mr. Grant?

MR. GRANT: No, Sir, nothing.

THE COURT: Did the evidence come up?

MR. ROCCO: No, it hasn't.

THE COURT: At this time I am going to excuse the alternate jurors.

Lunch has been ordered and will be here 12:30, and the marshalls will bring it to you downstairs. The alternate jurors may leave and take their things out of the jury room. I wish to thank you, and you are discharged, with the thanks of the court.

You may leave.

The clerk may swear in the marshalls.

(Whereupon the marshalls were duly sworn by the Clerk).

THE COURT: See if the other jurors are out.

Your Lunch will be here about 12:30. At that time you may have lunch and resume your deliberations after you have had your lunch.

The jury may leave for deliberations.

(Whereupon the jury was excused).

MR. GRANT: Judge, what is your requirement

as far as keeping in a proximity of the court.

THE COURT: When lunch is here at 12:30 we will take an hour for lunch. Then you can keep in touch with the clerk.

MR. ROCCO: The evidence is here.

THE COURT: Take it in to the jury.

MR. GRANT: Do you have anything further for us?

THE COURT: No, not right now.

(Court recessed).

(Afternoon session).

THE COURT: Come to order and be seated.

While you were out the court received two notes and this happened to be the type of thing court felt it could take care of and did.

Court Exhibit number 8 says, " We do not have Exhibits 3,9,10 and 11." I checked with the clerk and they are out for identification only. I wrote a note, " The above Exhibits are marked for identification only and not in evidence." That is the first one I got.

Anything you want to say on that?

MR. GRANT: No, Sir.

THE COURT: This is court Exhibit number 9: " Please give us a copy of the charge." And

I sent in a copy of the indictment.

Anything you wish to say on that? Those are the only notes the court has received.

MR. GRANT: No, Sir.

MR. ROCCO: Just one further thing, Your Honor. During the recess I asked the Court Reporter to check Your Honor's charge on the definition of conspiracy, and he checked and found that Your Honor had said it was a combination or agreement, and that was my understanding and thatis what the Reporter has.

MR. GRANT: That is correct. And it appears that I was in error.

THE COURT: We all make mistakes.

MR. GRANT: Thank you, Sir, and I appreciate the court's allowing me to take the time to call to your attention what I thought was a legitimate point.

THE COURT: That is your job.

So the jury is deliberating, and those are the only notes that the court has received. Those came in about 1:30, and I was here.

MR. GRANT: Your Honor, we will go down to the cafeteria. Or something.

MR. ROCCO: If Your Honor pleases, if the

court wishes to communicate with me, I can get in touch with the clerk.

MR. GRANT: We won't leave the building.

THE COURT: The jury lounge is opened.

MR. GRANT: I tried it this morning and it was locked.

One further question, Your Honor, do you have any idea as to how long you are going to hold them today?

THE COURT: I will go into the evening I would assume so, or whatever you think would be reasonable.

MR. GRANT: I will be guided by the court's feeling as to what is reasonable.

THE COURT: If you want to let them continue, we will let them continue to deliberate, that is up to you. I am not going to interfere with your prerogatives.

MR. GRANT: Thank you, Sir.

THE COURT: Court is adjourned.

(Whereupon court adjourned).

THE CLERK: The United States of America versus Paul Oates.

THE COURT: Come to order and be seated.

I have jury note, and this is Court Exhibit

numb - 10. " Please explain the second Count agai.. with emphasis on constructive possession and control."

I am going to read the element of the second Count for them again.

MR. GRANT: Very well, Your Honor.

MR. ROCCO: That is fine, Your Honor.

THE COURT: Bring in the jury.

(Whereupon the jury was brought in and seated in the jury box).

THE COURT: All right, ladies and gentlemen of the jury, the last note that the court received is court Exhibit number 10, and it says: " Please explain the second Count again with emphasis on constructive possession and control."

Count Two of the indictment charges that "Isaac Daniels aided and abetted by defendant Paul V. Oates possessed with intent to distribute approximately 485 grams of heroin hydrochloride on or about April 27, 1972."

The essential elements of this offense, which the government must prove beyond a reasonable doubt are:

First: That Isaac Daniels, aided and abetted by the defendant Paul V. Oates, on or about

April 27, 1972, possessed a quantity of heroin hydrochloride, a controlled substance.

Second: That Isaac Daniels, aided and abetted by the defendant Paul V. Oates on or about April 27, 1972, possessed heroin with the specific intent to distribute it, and

Third: That Paul V. Oates aided and abetted Isaac Daniels knowingly or intentionally.

As stated before, the burden is always on the government to prove beyond a reasonable doubt every essential element of the crime charged.

Bear in mind the following definitions in considering the essential elements of the crime charged.

(1) Possession: The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

An act is done knowingly if done voluntarily and intentionally, and not because of mistake or accirdnet or other innocent reason.

The purpose of adding the word "knowingly" was to insure no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

"Distribute": The term "distribute" means to deliver a controlled substance to the possessor of another person, which in turn means the actual, constructive, or attempted transfer of a controlled substance.

Aiding and abetting is dealt within Section 2 of Title 18 of the United States Code which

reads as follows:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

" Whoever willfully causes an act to be done, which is directly performed by him or another would be an offense against the United States, is punishable as a principal."

Thus, the guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of thatoffense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

" Aid and Abet"

In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal

veh

venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seeks by some act or omission of his to make the criminal venture succeed.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

You of course may not find any defendant guilty unless you find beyond reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond reasonable doubt that the defendant was a participant and not merely a knowing spectator.

The jury may return for deliberations.

(Whereupon the jury was excused from the courtroom).

THE COURT: We will take a recess.

(Whereupon the court recessed).

THE CLERK: The United States of America versus Paul V. Oates.

THE COURT: Gentlemen, the jury has reached a verdict and this will be the court's Exhibit number 11.

(Marked).

THE COURT: Are we ready to bring in the jury, gentlemen?

MR. GRANT: Yes, Your Honor.

MR. ROCCO: Yes, Your Honor.

THE COURT: Bring in the jury.

(Time Noted: 3:45 P.M.)

(Whereupon the jury was brought in and seated in the jury box).

THE CLERK: Madaam Forelady, will you please rise.

Have you agreed upon a verdict?

THE FORELADY: Yes.

THE CLERK: How do you find the defendant Paul V. Oates on Count One?

THE FORELADY: Guilty, Your Honor.

THE CLERK: How do you find the defendant Paul V. Oates on Count Two?

THE FORELADY: Guilty.

THE CLERK: You say you find the defendant Paul V. Oates guilty on Count One and on Count Two?

THE FORELADY: Yes.

THE COURT: Poll the jury.

THE CLERK: Juror number one, how do you say you find the defendant Paul V. Oates guilty on Count One and Count Two, is that your verdict?

JUROR NUMBER ONE: Yes.

THE CLERK: Juror number two, is that your verdict?

JUROR NUMBER TWO: Yes.

THE CLERK: Juror number three, is that your verdict?

JUROR NUMBER THREE: Yes.

THE CLERK: Juror number four, is that your verdict?

JUROR NUMBER FOUR: Yes.

THE CLERK: Juror number five, is that your verdict?

JUROR NUMBER FIVE: Yes.

THE CLERK: Juror number six, is that your

verdict?

JUROR NUMBER SIX: Yes.

THE CLERK: Juror number seven, is that your verdict?

JUROR NUMBER SEVEN: Yes.

THE CLERK: Juror number eight, is that your verdict?

JUROR NUMBER EIGHT: Yes.

THE CLERK: Juror number nine, is that your verdict?

JUROR NUMBER NINE: Yes.

THE CLERK: Juror number ten, is that your verdict?

JUROR NUMBER TEN: Yes.

THE CLERK: Juror number eleven, is that your verdict?

JUROR NUMBER ELEVEN: Yes.

THE CLERK: Juror number twelve, is that your verdict?

JUROR NUMBER TWELVE: Yes.

THE CLERK: The jury is polled, Your Honor.

THE COURT: Ladies and gentlemen, I want to thank you for your services and to state to you that we couldn't do cases without your help and your work and assistance in being here with us in

court.

The jury is discharged with the thanks of the court.

Are they to go back downstairs?

THE CLERK: Yes, Your Honor.

THE COURT: You are to return to the central jury room on the first floor.

Thank you, and have a nice day.

The jury may leave.

(Whereupon the jury was excused from the case).

THE COURT: Mr. Grant, anything you wish to say at this time?

MR. GRANT: Sir, I would like to assume the court is now going to schedule a date for sentencing?

THE COURT: The court will order a Pre-Sentence Report and at such time as that report is prepared, of course, there was a Pre-Sentence Report in this case, but I will have to get another Pre-Sentence Report.

MR. GRANT: Thank you, Your Honor.

At this time I would ask the court to continue Mr. Oates' bond.

THE COURT: Mr. Rocco.

MR. ROCCO: Your Honor, the defendant had

pleaded guilty to the charge here once before, and bail had been set, and the plea was withdrawn, and I have no opposition. Mr. Oates, it is my understanding, has made his court appearances.

THE COURT: All right, then bail will continue.

MR. ROCCO: I have no opposition.

THE COURT: I will take Motions. Do you have any Motions you wish to make?

MR. GRANT: May I have a moment please.

THE COURT: Sure.

Let the record indicate that the sealed Exhibi in the two envelopes are delivered by the clerk to Mr. Rocco. Those are defendant's Exhibits A nd B.

The defendant should receive his Exhibits. Return the defendant his Exhibit, and the Government has the Government's Exhibits.

MR. GRANT: We have no Motions at this time.

THE COURT: All right.

MR. GRANT: Judge, it has been an unusual privilege to know you, Sir.

(Time Noted: 4:00 P.M.)

***

CERTIFICATE OF SERVICE

LYLE RUSSELL, being first duly sworn, deposes and says that he has personally served two copies of the Appellant's Brief on Appeal to the United States Attorney by taking the same to the United States Attorney's office in the United States Courthouse, 225 Cadmen Plaza East, Brooklyn, New York, on this 24th day of May, 1976.

Lyle D. Russell

LYLE D. RUSSELL

Subscribed and sworn to before me this 24th day of May, 1976.

Bernard P. Rose

Notary Public ~~County, NY~~

My Commission Expires:

BERNARD P. ROSE
NOTARY PUBLIC, State of New York
No. 41-8039225
Qualified in Queens County
Commission Expires March 30, 19 78